No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1923

A. J. OLIVER, as Trustee in Bankruptcy of the Estate of West Coast Rubber Corporation, Inc. (a corporation), and OSCAR COURTIN, DOROTHY E. KNIGHT, D. C. TUHEY, H. BLACK and HUGH V. CASSERLY,

Petitioners,

vs.

UNITED STATES OF AMERICA (a sovereign corporation), and CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now your petitioners, A. J. Oliver, as trustee in bankruptcy of the estate of West Coast

Rubber Corporation, Inc., a corporation, and Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black and Hugh V. Casserly and respectfully petition this honorable court that a writ of certiorari may be granted directing the United States Circuit Court of Appeals for the Ninth Circuit to certify to this honorable court for its review and determination the case of "United States of America (a sovereign corporation) and the City and County of San Francisco (a municipal corporation), petitioners, v. A. J. Oliver, as Trustee, and Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black and Hugh V. Casserly, respondents—In the Matter of West Coast Rubber Corporation, Inc. (a corporation), Bankrupt, No. 3966", pending in that court, and in that behalf your petitioners respectfully show to this honorable court as follows:

Statement of Facts.

I.

In the bankruptcy matter of the West Coast Rubber Corporation, Inc., a corporation, pending before A. B. Kreft, Esq., a Referee in Bankruptcy of the United States District Court for the Southern Division of the Northern District of California, there were filed during the course of administration priority labor claims amounting to $1217.65, priority attachment cost claims amounting to $99.70, a claim for manufacturer's excise tax and penalties due the United States Government for $3048.01, and a claim for personal property taxes and penal-

ties due the City and County of San Francisco for $1008.61.

II.

There were not sufficient funds in the bankrupt estate wherewith to pay all expenses of administration and all of these claims in full as finally allowed, and the question arose before the referee as to the relative order of priority between labor claims, attachment cost claims, and tax claims, in the distribution of the balance of the estate after payment of expenses of administration.

III.

The labor claimants and the attachment costs claimants are the same; that is to say, shortly prior to bankruptcy certain employees of the bankrupt, your petitioners Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black and Hugh V. Casserly, who did not receive their wages earned within three months of the filing of the bankruptcy petition, brought suit in the state court of California and caused an attachment to be levied upon certain property of the bankrupt and in that suit expended certain costs. As against taxes, said petitioners herein asserted before the referee the right to priority of payment of their wages by virtue of the provisions of Sec. 64-b (4) of the Bankruptcy Act, and of their attachment costs by virtue of the provisions of Sec. 64-b (5) of the Act taken in conjunction with Sec. 69 of the Insolvency Act of the State of California. In the case of in re Amoratis,

178 Fed. Rep. 919, decided by the Circuit Court of Appeals for the Ninth Circuit, it was held that, inasmuch as attachment costs are given a priority by the insolvency law of California, they should also be given priority in bankruptcy under Sec. 64-b (5) as they are debts given priority by state law.

IV.

The referee made an order on April 7, 1922, fixing the amount of the labor and attachment costs claims and holding that these should be paid in full prior to any payment on the tax claims. This order was reviewed by District Judge Dooling, who on July 8, 1922, affirmed it; and the matter was then taken to the Circuit Court of Appeals for the Ninth Circuit, which, on July 2, 1923, handed down a decision reversing the order of the lower court and holding that taxes should be paid first.

Statement of Reasons Relied on for Allowance of Writ.

I.

The sole question involved in this case is the proper construction of Sec. 64, subdivisions "a" and "b", of the Bankruptcy Act. It was contended by your petitioners before the Referee, the District Judge and the Circuit Court of Appeals, that this section establishes the following order of priority:

(a) Cost of preserving estate. Sec. 64-b (1).

(b) Filing fees. Sec. 64-b (2).

(c) Costs of administration. Sec. 64-b (3).

(d) Wages. Sec. 64-b (4).

(e) Debts entitled to priority by the laws of the United States or of the various states (such as attachment costs). Sec. 64-b (5).

(f) Taxes. Sec. 64-a.

(g) General creditors.

This contention was upheld by the Referee and District Judge, but the Circuit Court of Appeals placed taxes ahead of wages and attachment costs.

II.

The decision of the District Judge is specifically based upon the language used by the Supreme Court in the recent case of City of Richmond v. Bird (249 U. S. 174, 43 Am. B. R. 260, 39 Sup. Ct. 186), which he thought settled the question, where the court said:

> "Section 64a directs that taxes be paid in advance of dividends to creditors; and dividends as commonly used throughout the act means partial payments to general creditors".

Collier on Bankruptcy, Thirteenth Edition, takes the same view as the District Judge, for in Vol. 2, page 1441, it states:

> "The tendency of the earlier cases was to construe subsection 'a' as putting taxes in a different and really higher class than the debts

> enumerated in subsection 'b', but it is now definitely settled that tax claims have priority over claims of general creditors only and not over the claims mentioned in subsection 'b' "

and then cites City of Richmond v. Bird, supra. The Court of Appeals for the Seventh Circuit in the case of in re Utt, 5 Am. B. R. 383, 105 Fed. 754, takes the same view as the Supreme Court as to the meaning of the word "dividends".

III.

The decision of the Ninth Circuit Court of Appeals reversing the District Judge is specifically based upon the language used by the Supreme Court in the earlier case of Guarantee Title and Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 27 Am. B. R. 873, where the court said:

> "Labor claims are given priority and it is provided that debts having priority shall be paid in full. The only exception is taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality."

The Supreme Court evidently had in mind in making such a statement that the words "except as herein provided" at the commencement of Sec. 64-b refer to some exception contained in that section only and, therefore, necessarily in the tax portion, 64-a; but your petitioners are of the opinion that such words really mean *"except as in the act otherwise provided"* and refer to liens upon the property of the estate not affected by the act such

as vendors' liens, mechanics' liens, materialmen's liens, landlords' liens, mortgage liens, liens on special funds, pledges, warehousemen's liens, etc., which are protected by Sec. 67-d of the Act and must be recognized in the distribution of the estate; and that the Supreme Court was of the same opinion when it made the statement it did in City of Richmond v. Bird, supra. Similar language as to exceptions is to be found in Sec. 21-b and Sec. 38-4, but in both cases it is obvious that the words really mean *"except as in the act otherwise provided."*

The Court of Appeals refers, in its decision, to City of Richmond v. Bird, supra, but holds that the language of the court in that case was not necessary to the decision, and, while conceding that the language of the court in the Guarantee Title & Trust Co. v. Title Guaranty & Surety Co. case may have been unnecessary to the decision, holds that the statement of the Supreme Court in that earlier case should be taken as the expression of the view of the court upon the question of the relative rank of taxes and labor claims and that it is not inconsistent with what is said on the subject in City of Richmond v. Bird. It seems to your petitioners that the two expressions of the Supreme Court are in direct conflict and cannot be reconciled, and that the later expression in City of Richmond v. Bird controls, if either.

The Court of Appeals, also, in its decision, says:

> "The power to levy and collect taxes is not only an indispensible attribute of sovereignty

> but it is absolutely necessary to the support of the government, the maintenance of law and order and the protection of life and property. It is not to be supposed that the power to tax would be subordinated to the claim of any creditor however meritorious that claim may be".

and yet Justice McKenna, in the Guarantee Title & Trust Co. v. Title Guaranty & Surety Co. case, said:

> "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state and individual—and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

IV.

In view of the statement of the Supreme Court in City of Richmond v. Bird, supra, when considering the meaning of the language in the tax section, 64-a, that "taxes be paid in advance of dividends to creditors", that the word "dividends" means "partial payments to general creditors", your petitioners contend that the payments required to be made by Sec. 64-b, which includes labor and attachment costs claims, must be paid in advance of taxes as the estate is not ready to pay dividends to general creditors until all such payments have been made. The words "in advance of" really mean

"next preceding". If, therefore, Sec. 64a is given this construction, it would read: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, *next preceding partial payments to general creditors.*"

V.

In the case of Matter of Kittenplan, 49 Am. B. R. 410, 285 Fed. 62, the District Court for the Southern Division of New York, held in conformity with the decision of the Court of Appeals for the Ninth Circuit, but in the case of in re Essenkay Products Co., No. 3459, in the District Court for the Eastern District of Illinois, District Judge Carpenter on Jan. 8, 1923, in an unreported case held in conformity with District Judge Dooling's decision that labor claims come first. There is an expression in Matter of Anderson, 279 Fed. 525, 48 Am. B. R. 350, 353, which may be *obiter dicta,* as follows:

> "The order of payment to the United States is next after wages due workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceedings. The Guarantee Title and Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 27 Am. B. R. 873, 32 Sup. Ct. 457, 56 Law Ed. 706."

It is to be noted that the Circuit Court of Appeals for the Second Circuit takes a different view of Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., than the Court of Appeals for the Ninth Circuit in the case at bar.

VI.

There is another and more serious conflict among the decisions as to whether, in view of the fact that the tax section, 64-a, precedes 64-b providing for the priority of costs of administration, labor claims, etc., taxes should not be placed ahead of everything and be paid in advance of costs of administration. A number of the early cases held that taxes must be paid first even in advance of expenses of administration. See

In re Weiss (D. C. N. Y.), 20 Am. B. R. 247, 159 Fed. 295;

In re Prince & Walter (D. C. Pa.), 12 Am. B. R. 675, 131 Fed. 546;

In re Cramond (D. C. N. Y.), 17 Am. B. R. 22, 145 Fed. 966;

In re Weissman (D. C. Conn.), 24 Am. B. R. 150, 178 Fed. 115.

Later cases have repudiated this doctrine and held that expenses of administration must be paid before taxes. See

State of New Jersey v. Lovell (C. C. A. 3rd Cir.), 24 Am. B. R. 562, 179 Fed. 321;

Matter of Jacobson (C. C. A. 7th Cir), 45 Am. B. R. 1, 263 Fed. 883;

Polk County, Iowa v. Burnes (C. C. A. 8th Cir.), 40 Am. B. R. 727, 247 Fed. 399;

In re Oxley (D. C. Wash.), 30 Am. B. R. 406, 204 Fed 826;

In re Hessler Foundry & Mfg. Co., 45 Am. B. R. 382.

VII.

The question as to the proper place for taxes in the distribution of bankrupt estates has become important throughout the United States owing to the many cases in which large claims for back income taxes have been filed by the United States Government and in which labor claims have also been filed. Trustees and referees have been in doubt, owing to the conflict in decisions above noted, as to which should be paid first. Your petitioners have been informed through the office of the Attorney-General of the United States that there are now pending in the various Federal Courts throughout the United States seven cases in which the precise question is the same as the one in the case at bar.

Your petitioners believe that, in view of the conflict in the decisions, and the divergent opinions respecting the meaning of the language of the Supreme Court used in City of Richmond v. Bird, supra, and Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., supra, it is essential to a uniform contruction throughout the United States of Sec. 64, subdivisions "a" and "b", of the Bankruptcy Act, that an authoritative ruling be made by the Supreme Court in the case at bar.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding

said court to certify and send to this court on a day certain to be designated a full and complete transcript of the record and all proceedings of said court of appeals in this case, being Cause No. 3966 in said court, to the end that said cause may be reviewed by this court as provided by law; and that your petitioners may have such other relief or remedy in the premises as to this court may seem appropriate; and that the judgment of said United States Court of Appeals for the Ninth Circuit so complained of herein may be reversed by this honorable court.

Dated, San Francisco,
September 15, 1923.

A. J. OLIVER, *as Trustee in Bankruptcy of the Estate of West Coast Rubber Corporation, Inc., (a corporation)*,
OSCAR COURTIN,
DOROTHY E. KNIGHT,
D. C. TUHEY,
H. BLACK,
HUGH V. CASSERLY.
Petitioners.

REUBEN G. HUNT,
Attorney for Petitioners.

LOUIS V. CROWLEY,
Of Counsel.

State of California,
City and County of San Francisco,—ss.

A. J. OLIVER, being first duly sworn, deposes and says:

I am one of the petitioners named in the foregoing petition, and make this verification also on behalf of the other petitioners. I have read the said petition and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

A. J. OLIVER,

Subscribed and sworn to before me this 15th day of September, 1923.

(Seal) J. D. Brown,
Notary public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for petitioners in the above entitled cause and that in my judgment the foregoing petition for writ of certiorari is well founded in point of law as well as in fact and that said petition for writ of certiorari is not interposed for delay.

Dated, San Francisco,
September 15, 1923.

LOUIS V. CROWLEY,
Of Counsel for Petitioners.